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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KEN WILKENS, Plaintiff and Respondent, v. BOBBI WILKENS, Defendant and Appellant.	G056107 (Super. Ct. No. 30-2017-00943190) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas A. Delaney, Judge. Affirmed.

The Buncher Law Corporation and Sven D. Buncher; Alan S. Yockelson for Defendant and Appellant.

Patrick J. D'Arcy for Plaintiff and Respondent.

INTRODUCTION

Bobbi Wilkens appeals from an order denying her anti-SLAPP motion, which she made in response to a complaint for defamation filed by her then-husband, Ken Wilkens. Ken filed for divorce from Bobbi in August 2017, and Bobbi almost immediately filed a request for a domestic violence restraining order against him. The basis of Ken's subsequent defamation action was a series of emails Bobbi sent to members of Ken's family and to some friends shortly after obtaining the restraining order.

Bobbi claimed the emails were protected activity, as defined by Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] The trial court disagreed, noting that the emails did not report on or reference the issues in the family law case or ask any of the recipients to be witnesses in the upcoming hearing on the restraining order.

We affirm the order. During oral argument, Ken's counsel conceded that most of the defamatory statements alleged in the complaint were protected conduct. The sole exception was a series of statements regarding an extramarital affair. But even considering all the statements as protected conduct under the anti-SLAPP statute, Ken carried his burden to demonstrate a probability of prevailing.

FACTS

Ken filed for divorce from Bobbi in August 2017, after 12 years of marriage. The couple have two minor children.

On August 10, 2017, Bobbi filed a request for domestic violence restraining order (TRO) against Ken. To the filled-out judicial council forms, she attached a 10-page declaration to support her request. The TRO was granted on August 10, and a hearing date for a more permanent order was set for August 29.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

On September 12, 2017, Ken filed a complaint against Bobbi for defamation, basing his claim on statements made (1) in emails Bobbi sent to his family members and friends between August 15 and August 26, 2017, and (2) in an attachment to the emails sent on August 26 (three emails to five persons), which was a copy of the declaration originally filed with the family court as part of Bobbi's request for the TRO.

The statements in the emails alleged to be defamatory were:

- Ken had had a longstanding and increasingly severe problem with drugs (Xanax) and alcohol (wine and beer);
- Ken's nightly behavior while intoxicated scared the couple's two sons;
- Ken frequently drove while intoxicated;
- Ken was having an affair;
- Finding out about the affair devastated Bobbi;
- Ken's affair took place in the couple's home while Bobbi was absent and was observed by the couple's neighbors;
- Bobbi obtained a temporary restraining order based on Ken's substance abuse, guns, and reactive personality.

The statements in the attachment to the emails, the declaration originally filed in the family court, alleged to be defamatory were:

- Ken had guns in the house, one of which he pointed at someone while intoxicated;
- Ken was intoxicated at night every night for the past year;
- Ken attempted to drive the couple's two sons while intoxicated;
- Ken exhibited behaviors consistent with narcissistic personality disorder;

• Ken became highly intoxicated, mentally unstable, irrational, temperamental, and out of control owing to a combination of alcohol and drugs.[2]

Bobbi sent the emails to Ken's mother, father, brothers and other family members, and friends. Much of the text in each email was identical, repeating the information regarding the purported drug and alcohol abuse, the drunk driving, and the affair. Other portions of the emails were tailored to the individual recipients. Most of the emails included the attachment, but the complaint identified only the attachments sent on August 26 as defamatory.

Meanwhile, in the family law court, the hearing date for the domestic violence TRO was continued, at Bobbi's request, several times. On October 16, after a five-day hearing, the court denied Bobbi's request for a permanent restraining order or an extension of the existing TRO. The court found she had not carried her burden of demonstrating physical violence or attempted physical violence on Ken's part. Of the accusations leveled against Ken, the court found Bobbi credible only as to those relating to Ken's drinking. But the court found the drinking behavior did not rise to the level of domestic violence justifying a permanent injunction.[3]

Bobbi filed her anti-SLAPP motion against the defamation action on November 13, 2017. She claimed the emails were protected as writings "(2) . . . made in connection with an issue under consideration or review by a . . . judicial body . . . ." (§ 425.16, subd. (e)) namely, the TRO proceeding. In her declaration, Bobbi claimed she

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[2] In the respondent's brief, Ken refers to two other accusations made by Bobbi – that he had short-term memory loss and had been found in a "fetal position" – asserting that she failed to deal with these accusations in her opening brief, thereby admitting their defamatory nature. But his complaint did not allege that short-term memory loss or "fetal position" was among the defamatory statements.

[3] In her reply to the anti-SLAPP motion, Bobbi asserted that she obtained "a stipulated order granting to her among other things, primary custody, the requirement that Plaintiff utilize the Scram Systems Wireless, Portable, Breath Alcohol Device, the appointment of an Evidence Code §730 Child Custody Evaluator, Child Support, Spousal Support, and other relief." The October 16 order in the record gives her legal and physical custody, but there is no support in the record for her assertions regarding the other matters.

sent the emails to encourage the recipients to come forward and to persuade them to provide testimony regarding Ken's substance abuse.

Ken opposed the motion by (1) supplying copies of the emails that Bobbi had neglected to attach to her motion and (2) attaching declarations from each of the email recipients stating that they had not been asked to testify at the TRO hearing. He also submitted his own declaration, explaining why each of the recipients could not have been interested in or connected with the TRO proceeding.

The court denied the motion on the ground that Bobbi had failed show that the statements were protected conduct, that is, that they were connected to an issue under consideration or review by a judicial body. The emails did not solicit any of the recipients to be witnesses or declarants in a legal proceeding. None of the recipients appeared to have any connection with the family law case.

DISCUSSION

Section 425.16 was enacted to counteract "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) The statute protects defendants from meritless suits that include "(1) [a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution[.]" (*Id.*, subd. (b); see *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*) ["The anti-SLAPP statute does not insulate defendants from any liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity."])

We review orders granting or denying anti-SLAPP motions de novo. (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 44.) We employ the same analytic process in our review as the one used by the trial court. (See *Moss Bros. Toy, Inc. v. Ruiz* (2018) 27 Cal.App.5th 424, 433.)

The two-step analysis of anti-SLAPP motions examines, first, whether the defendant has carried the burden of showing the cause of action arises from protected conduct as the statute defines it.[4] If the defendant makes this showing, the burden shifts to the plaintiff "to demonstrate the merit of the claim by establishing a probability of success." (*Baral, supra,* 1 Cal.5th at p. 384.)

I. Protected Conduct

Bobbi based her claim of protected conduct on section 425.16, subdivision (e): "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . .," i.e., the TRO proceeding. She asserts that the statute protects her constitutional right of petition for redress of grievances and that the emails were sent to recruit witnesses for the TRO proceeding.

Considering counsel's concession at oral argument, we need not spend a great deal of time discussing protected conduct. Counsel has agreed that all the statements except those relating to the extramarital affair were made "in connection with" the TRO proceeding. As to the affair, Ken argues that whether he was having one (which he denies) had no connection with the TRO proceeding, as the court would not entertain an issue of marital infidelity in deciding whether to issue a TRO. Bobbi acknowledged as much in her emails.

Bobbi argues that even the allegations regarding the affair are protected because the court issued orders going beyond domestic violence, and encompassed issues of visitation, as to which his extramarital activities could be relevant, and an Evidence Code section 730 evaluation of Ken. The original TRO request did not mention a 730

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[4] Protected conduct includes "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

evaluation, and the original TRO, granted in August, was a bare-bones order regarding personal conduct, contact, guns, financial matters, and so on. Per Bobbi's request, the court ordered *no* visitation until the hearing, so whether Ken was seeing someone else could not have been an issue in August. In short, nothing in the record supports Bobbi's claim that at the time she sent the emails, Ken's alleged affair was connected with the litigation.

II. Probability of Prevailing

Once a defendant has made a threshold showing of protected conduct, a plaintiff "may defeat the anti-SLAPP motion by establishing a probability of prevailing . . . ." (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 95.) This is not a heavy burden. A plaintiff need only offer a legally sufficient complaint and support it by enough evidence to make a prima facie showing. (*Id.* at p. 89.) A "prima facie showing" consists of evidence sufficient to sustain a favorable judgment if the evidence is credited. (*Ibid.*)

Bobbi asserts that Ken has no probability of prevailing in his defamation action because her statements are absolutely privileged under the litigation privilege of Civil Code section 47, subdivision (b). This is the sole argument she has proffered regarding Ken's probability of prevailing.

The litigation privilege does not apply here. Ken has made a prima facie showing for prevailing if his evidence is believed. The litigation privilege does not protect communications having no logical relation to a court proceeding. (See *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 (*Silberg*).)

The circumstances in this case are similar to those in *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134 (*Rothman*). In *Rothman,* attorneys for singer Michael Jackson, called a press conference after accusations that Jackson had molested a boy were leaked. In the press conference, Jackson's attorneys accused the boy's lawyer and his clients of inventing the whole story in order to extort money from Jackson. The boy's

lawyer, Rothman, sued, and the defendant attorneys' demurrer was sustained without leave to amend, on privilege grounds. (*Id.* at pp. 1138-1139.)

The analysis in *Rothman* is grounded on *Silberg, supra,* one of the seminal cases on California's litigation privilege. While a communication having "some logical relation" to a court proceeding is privileged (*Silberg, supra,* 50 Cal.3d at p. 220), "republications to nonparticipants in the action are generally not privileged . . . and are thus actionable unless privileged on some other basis." (*Id.* at p. 219.) Expanding on this statement from *Silberg*, the *Rothman* court explained, "While a 'logical relation' certainly exists between court pleadings and out-of-court statements that include identical or similar allegations, a 'logical relation' of this kind is not sufficient to invoke the litigation privilege." (*Rothman, supra,* 49 Cal.App.4th at p. 1145.) "[T]he 'connection or logical relation' which a communication must bear to litigation in order for the privilege to apply, is a *functional* connection. That is to say, the *communicative act* – be it a document filed with the court, a letter between counsel or an oral statement – must function as a necessary or useful step in the litigation process and must serve its purposes. This is a very different thing from saying that the communication's *content* need only be related in some way to the subject matter of the litigation . . . . Public mudslinging, while a less physically destructive form of self-help than a public brawl, is nevertheless one of the kinds of unregulated and harmful feuding that courts and their processes exist to prevent. It would be counterproductive to afford to it the same protections which [Civil Code] section 47, subdivision (b) gives to court processes." (*Id.* at p. 1146.) The litigation privilege did not apply, and the judgment was reversed. (*Id.* at p. 1151.)

In this case, as in *Rothman*, the necessary connection between the litigation and the communicative act of sending the emails is lacking. Bobbi has confused an interest in the people involved in the TRO process with an interest in the litigation itself. While the children's grandparents and other family members who received the emails are

interested in the children's welfare, the relevant question is whether they have a connection with or logical relation to the TRO hearing.

Ken has carried his burden to establish a prima facie case that the email recipients were nonparticipants in the action, and sending the emails and attachments to them did not serve the purpose of the litigation process. At this stage of the proceedings, the litigation privilege does not protect Bobbi's emails.

DISPOSITION

The order denying the anti-SLAPP motion is affirmed. Respondent is to recover his costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.